No. 17-1625

In the
Supreme Court of the United States

RIMINI STREET, INC., et al.,

Petitioners,

v.

ORACLE USA, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Copyright Act provides that a court "in its discretion may allow the recovery of full costs" to a prevailing party. 17 U.S.C. §505. That "full costs" language stands in contrast to the default federal cost-shifting statute, which would apply even in the absence of specific language in the Copyright Act, and under which courts may "tax as costs" only a subset of litigation expenses—generally known as "taxable costs." *See* 28 U.S.C. §1920.

The question presented is:

Whether the Copyright Act, which gives courts "discretion" to award prevailing parties their "full costs," authorizes recovery of the full range of litigation costs, or authorizes recovery of only the subset of costs that are taxable under 28 U.S.C. §1920.

PARTIES TO THE PROCEEDING

Petitioners, and defendants below, are Rimini Street, Inc., and Seth Ravin.

Respondents, and plaintiffs below, are Oracle America, Inc., and Oracle International Corporation. Although Oracle USA, Inc., continues to be named in the case caption as a plaintiff, that entity no longer exists.

CORPORATE DISCLOSURE STATEMENT

Oracle Corporation is the ultimate parent company of Oracle America, Inc., and Oracle International Corporation. Oracle Corporation also was the ultimate parent of Oracle USA, Inc., but that entity no longer exists. Oracle Corporation wholly owns, through one or more of its privately-held, wholly-owned subsidiaries, Oracle America, Inc., and Oracle International Corporation. No other publicly held corporation owns 10% or more of the stock in Oracle America, Inc., or Oracle International Corporation.

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INTRODUCTION

When the text of a statute is clear, judicial inquiry ends where it begins—with the text. That long-settled principle resolves this case. The Copyright Act provides that a court "in its discretion may allow the recovery of full costs" to a prevailing party. 17 U.S.C. §505. The statute means what it says: A prevailing party may receive his full costs, not just a subset of them. Petitioners' contrary interpretation, under which "full costs" means "only those costs that may be independently taxed under 28 U.S.C. §1920," cannot be reconciled with the plain terms of the statute, as it would render superfluous not just the word "full," but the Copyright Act's entire authorization for cost-shifting. Plain text and canons against superfluity and implied repeals all counsel against reading "full" to mean nothing at all. Neither this Court's precedent nor petitioners' flawed historical narrative remotely justifies reading §505's grant of cost-shifting authority out of the U.S. Code. And sound copyright policy is served by giving §505 its plain meaning, rather than saddling prevailing parties with unreimbursable e-discovery costs that will leave valid copyrights unvindicated. The Court should give the text its plain meaning and hold that "full" means full, rather than nothing at all.

STATEMENT OF THE CASE

A. Statutory Background

For nearly two centuries, the Copyright Act has expressly allowed prevailing parties to recover their "full costs" in copyright actions. Congress first established that rule in 1831, and it has maintained it ever since. *See* Copyright Act of 1831 ("1831 Act"), ch.

16, §12, 4 Stat. 436, 438-39; Act of July 8, 1870, ch. 230, §108, 16 Stat. 198, 215; Copyright Act of 1909 ("1909 Act"), ch. 320, §40, 35 Stat. 1075, 1084; Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2586.

The "full costs" approach reflected in the Copyright Act stands in marked contrast to how Congress addressed cost-shifting in other early statutes. In the 1789 Process Act, for instance, Congress expressly tied costs recovery to state law, providing that "rates of fees ... in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." Act of Sept. 29, 1789 ("Process Act"), ch. 21, §2, 1 Stat. 93, 93. Congress took a similar approach in 1793, providing that in federal court cases other than admiralty and maritime (as to which the same Act established a separate regime), prevailing parties shall "be allowed ... such compensation for their travel and attendance, and for attornies and counsellors' fees ... as are allowed in the supreme or superior courts of the respective states." Act of Mar. 1, 1793 ("1793 Act"), ch. 20, §4, 1 Stat. 332, 333. The 1793 Act was twice extended before lapsing in 1799. *See* Act of Feb. 25, 1795 ("1795 Act"), ch. 28, 1 Stat. 419, 419; Act of Mar. 31, 1796 ("1796 Act"), ch. 11, 1 Stat. 451, 451-52.

In other early provisions, Congress took a different approach, establishing an explicit federal rule for what costs may be recovered in particular causes of action or how much may be recovered for particular costs, rather than incorporating state law.

See, e.g., 1793 Act §§1-3 (establishing specific recovery rules for admiralty and maritime cases); Act of Mar. 2, 1799, ch. 22, §71, 1 Stat. 627, 678 (specifying that a revenue officer prosecuted without sufficient cause was entitled to recover double costs).

The 1831 Copyright Act adopted a copyright-specific approach to cost-shifting and took yet another tack. Unlike the Process Act and the general provisions of the 1793 Act, the Copyright Act did not incorporate state cost-shifting laws. Nor did it delineate specific categories and amounts of costs that may be recovered, like the admiralty and maritime provisions of the 1793 Act. Instead, the 1831 Copyright Act provided that, in statutory copyright actions in federal court, "*full* costs shall be allowed." 1831 Act §12 (emphasis added). Making clear that this was a departure from its approach in other federal statutes, Congress added the express caveat "any thing in any former act to the contrary notwithstanding." *Id.*

While that "full costs" approach may have been a recognized departure from other early federal statutes, it was not an unprecedented approach in copyright law. "Full costs" is the language Parliament used in the Statute of Anne, the seminal English copyright act. When the Statute of Anne was enacted, it was well settled in England that a prevailing party could recover "not merely the fees which the party has had to pay to the officers of the court at the different stages of the litigation, but likewise the fees which he has had to pay to his own lawyers," as well as various "other expenses of preparing his case for trial." Charles T. McCormick, *Damages* 235 (1935). That

understanding developed out of the Statute of Gloucester, 6 Edw. I., c. 1 (1275) (Eng.), under which "costs" was liberally construed to include "all the legall cost of the suit," except for the prevailing plaintiff's expenses for "travell and losse of time." Sir Edward Coke, *2d Institutes* 288 (1681); *see also Witham v. Hill* (1759) 95 Eng. Rep. 703, 703 (K.B.) (Lord Chief Justice Willes) (Statute of Gloucester allowed recovery of the "whole costs of all the process in the cause").[1] Like other contemporaneous English statutes, the Statute of Anne took that then-settled rule one step further, specifying that not just a prevailing plaintiff, but also a prevailing defendant, could recover its "full costs." *See* 8 Anne, c. 19, §8 (1710) (Eng.).

About 20 years after Congress introduced the "full costs" rule into the Copyright Act, Congress adopted a default federal rule for taxing costs. Resolving disuniformity that had arisen after Congress' initial cost-shifting statutes lapsed, Congress enacted the Fee Act of 1853, which established a uniform rule "in lieu of the compensation now allowed by law ... in the several States." Act of Feb. 26, 1853 ("Fee Act"), ch. 80, 10 Stat. 161, 161. While the Fee Act set rates of recovery for a wide variety of litigation expenses, including fees charged by attorneys, it made clear that

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[1] England later shifted to a more restrictive cost-shifting regime. *See infra* pp.45-46. But (as petitioners conveniently neglect to mention) that shift did not crystalize until after the Statute of Anne and the 1831 Copyright Act were enacted. Indeed, as the very treatise upon which petitioners rely observes, the changes brought about in the mid-1800s so fundamentally altered costs jurisprudence as to render treatises written a few decades earlier "practically obsolete." John Gray, *A Treatise on the Law of Costs* iii (1853).

it did not prevent attorneys from charging their clients reasonable compensation "in addition to the taxable costs." *Id.*

"The sweeping reforms of the 1853 [Fee] Act have been carried forward to today," *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987), and are now embodied in the narrower range of taxable costs set forth in 28 U.S.C. §§1920 and 1821. In many cases, Congress carried forward provisions without adjustment for inflation. For example, while Congress provided for the recovery of $2.50 per deposition admitted into evidence in 1853, it provides the same amount today. *See* 28 U.S.C. §1923(a). Congress did not, however, carry its reforms through to the Copyright Act. While Congress acknowledged in the Fee Act that there were litigation costs "in addition to the taxable costs," neither that Act nor any of its successors expressly mentioned the Copyright Act's "full costs" provision, which pre-dated the Fee Act and was repeatedly re-enacted thereafter. Indeed, Congress repeatedly re-enacted the "full costs" language even as it dramatically overhauled other aspects of copyright law and made other changes to the cost-shifting provision.

For instance, in 1909, after growing acceptance of the "American Rule" had created some uncertainty about whether attorneys' fees could be recovered as costs, Congress amended the "full costs" provision to confirm that attorneys' fees were available to the prevailing party. Congress did so, moreover, not by separately authorizing attorneys' fees, but by expressly including them in the "full costs" authorized by the Act: "[T]he court may award to the prevailing

party a reasonable attorney's fee as part of the costs." 1909 Act §40.[2]

More recently, in the 1976 Copyright Act, which was a soup-to-nuts "overhaul of copyright law," Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 Va. L. Rev. 1745, 1799 (2012), Congress amended the Act's cost-shifting provision to change the "full costs" regime "from a mandatory one to one of discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 n.11 (1994). In doing so, however, Congress (which was well aware of the distinction between taxable and nontaxable costs) once again retained the term "full costs," producing the language now found at 17 U.S.C. §505: "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

Congress' reaffirmation of full reimbursement was no accident. Copyright law has long embraced the principle that copyrighted works merit full protection even if their value is difficult to prove or they lack commercial value. Congress recognizes that "a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers," and indeed, little incentive to bring

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[2] Congress also at that time added language exempting the United States from the Act's cost-shifting regime. *See* 1909 Act §40 ("in all actions, suits, or proceedings under this Act, except when brought by or against the United States or any officer amended, thereof").

infringement actions in the first place. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952). To that end, the Copyright Act has long allowed for more robust recovery than is available in other intellectual property contexts. That is reflected in the long-standing availability of both statutory damages for copyright infringement, 17 U.S.C. §504, and the shifting of full costs, including attorneys' fees, even in non-extraordinary cases.

Notably, this is not the only context in which Congress has decided to make "full costs" available. On multiple recent occasions, Congress has included "full costs" provisions in federal statutes addressing a range of causes of action. *See* 17 U.S.C. §911(f); 28 U.S.C. §4001(g); 47 U.S.C. §553(c)(2); 47 U.S.C. §605(e)(3)(B)(iii). In the case of 47 U.S.C. §605, which prohibits the unauthorized receipt or transmission of communications, the legislative history reflects a specific understanding that this term was not confined to taxable costs, but rather included recovery for categories of costs not taxable under §1920. *See* 130 Cong. Rec. S14286 (daily ed. Oct. 11, 1984) (Statement of Sen. Robert W. Packwood, Chairman of Comm. on Commerce, Science, & Transp.), *reprinted in* 1984 U.S.C.C.A.N. 4742, 4750 (1984) ("It is the intent of the Committee that the power to direct the recovery of all costs under 3(b)(iii) shall include reasonable investigative fees (related to the action brought) of an aggrieved party.").

B. Proceedings Below

This case arises out of Rimini's adjudicated serial infringement of Oracle's copyrights. Oracle develops and licenses enterprise software programs that

customers use to perform critical business functions. As is typical in the industry, Oracle does not sell ownership rights to its enterprise software. Customers purchase licenses that enable them to use specific programs and to access sites containing support materials for those programs, while Oracle retains all intellectual property rights in its works. Those licenses impose strict limits on copying Oracle's software and even stricter limits on access, use, or copying of the software and support materials by third parties, including third parties who provide software support.

Rimini was founded in 2005 by Seth Ravin. Unlike Oracle, which spends billions of dollars on research and development and employs more than 30,000 software engineers who write new programs as well as patches, fixes, and updates for Oracle's existing software, Rimini does not develop or license its own enterprise software. Instead, Rimini competes with Oracle to provide support services to customers who use Oracle's software. Pet.App.5a. Rimini is not the first such business of Ravin's. Before starting Rimini, Ravin was president of another company that purported to legitimately service Oracle's software, only to later stipulate to civil *and criminal* liability for infringing Oracle's copyrights.[3] Ravin's new company proceeded down the same path, repeatedly downloading and copying Oracle's copyrighted

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[3] *See* Trial Stip. ¶¶15-16, *Oracle USA, Inc. v. SAP AG*, No. 07-CV-1658 (N.D. Cal. Sept. 20, 2010), Dkt.911; FBI Press Release, *TomorrowNow, Inc., Sentenced on Computer Intrusion and Copyright Infringement Charges* (Sept. 14, 2011), http://bit.ly/2kVbc0j.

software for the benefit of Rimini's own customers, without obtaining Oracle's permission or paying Oracle for its copyrighted material. The scale of Rimini's unauthorized copying was massive. All told, Rimini developed a library of copies of Oracle software and support materials that was "approximately a couple times the size of ... all of the books in the Library of Congress." SER446.

There was nothing ambiguous about the nature of this activity; even petitioners' own lawyer told Ravin, "You have to admit this looks pretty bad." ER474. Nor was there anything ambiguous about the reason for all this unauthorized copying: It enabled Rimini, in the words of its own witness, to "mak[e] a crap load of money from" selling services built around Oracle's intellectual property. ER68-69. In short, as the district court found, "Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its ... market share and business growth without these infringing and illegal actions." Pet.App.49a.

Throughout the litigation, petitioners went to great lengths to prevent Oracle and the court from discovering this infringement. First, as the district court found, Rimini "affirmatively and irretrievably deleted" its massive library of intermingled copies of Oracle software and support materials. JA65; *see also* JA85 ("The court finds that Rimini spoliated evidence when it deleted the software library in January 2010."). That made it impossible to identify the source

of the thousands of copies that Rimini used to support its customers, which was critical since Rimini tried to defend itself by maintaining that it obtained those copies legitimately. JA87-88. The district court sanctioned Rimini for its spoliation by submitting an adverse-inference instruction to the jury. JA88-91.

Second, petitioners repeatedly and adamantly lied about "cross-use"—*i.e.*, using one licensee's copy of Oracle's software to provide support services to other customers—which Oracle's licensing agreements do not authorize. Ravin insisted in the litigation against his former company that Rimini never cross-used Oracle's software, and he did so again in his deposition in this case, stating emphatically that "[n]ever in the entire history of Rimini" did "it ever occur[] that one customer's software environment ha[d] been used to develop a fix or update that was ultimately delivered to a different customer." SER627, JA232-34. Rimini made the same representations in formal pleadings, repeatedly insisting that "each client is assigned a separate data 'silo' where Oracle Software and Support Materials for only that client are maintained." *E.g.*, SER45, 54, 73-74.

None of that was true. Notwithstanding Rimini's spoliation—which deprived Oracle of straightforward evidence of cross-use, JA87-88—Oracle proved at trial that Rimini regularly engaged in cross-use. JA107. The proof Oracle adduced was insurmountable—so much so that when Ravin was confronted with the evidence at trial, he was forced into a complete about-face, blithely admitting that Rimini engaged in cross-use "all the time" and that his earlier deposition testimony was false. JA232; *see* SER410-16.

Unsurprisingly given the overwhelming evidence of infringement (including petitioners' own belated admissions), Oracle prevailed at trial on all 93 of its copyright claims against Rimini. To remedy Rimini's infringement, the jury awarded Oracle the fair market value of a hypothetical license, which it measured at $35,600,000. Pet.App.80a. The district court awarded Oracle $28,502,246.40 in attorneys' fees, applying a 20% across-the-board discount. The court also awarded $4,950,566.70 in taxable costs and $12,774,550.26—roughly 25% less than Oracle sought—in nontaxable costs, much of which stemmed from e-discovery and expert costs attributable to countering petitioners' destruction and dissembling. Pet.App.69a-71a. And the court awarded $22,491,636.16 in prejudgment interest on the copyright award. Pet.App.27a. Finally, the court permanently enjoined Rimini from further copying the software in violation of Oracle's licenses. Pet.App.38a-39a.

The Ninth Circuit affirmed the jury's copyright verdict and copyright damages award in full, as well as the district court's prejudgment interest award. Pet.App.1a-35a. The court also affirmed the award of both taxable and nontaxable costs based on longstanding circuit precedent interpreting 17 U.S.C. §505 to permit the recovery of nontaxable costs, but reduced the taxable costs award by approximately $1.5 million due to an acknowledged clerical error by the district court. Pet.App.32a-33a. Because the court reversed on state-law claims not at issue here, however, it vacated and remanded for reconsideration of the injunction and the attorneys' fees award. Pet.App.30a-32a. On remand, the district court once

again awarded attorneys' fees and entered an injunction. Petitioners' appeal from that decision is pending.

SUMMARY OF ARGUMENT

The Copyright Act provides that a court "in its discretion may allow the recovery of *full costs*" to the prevailing party. 17 U.S.C. §505 (emphasis added). By its plain terms, the Copyright Act allows the recovery of not just some costs—such as the subset that may be taxed under 28 U.S.C. §1920—but "*full* costs," which naturally includes *all* of a prevailing party's costs, such as Oracle's significant e-discovery costs in this litigation. The contrary reading, under which "full costs" means only those costs taxable under §1920, would render the term "full," and indeed the entire first sentence of §505, superfluous, as §1920 grants courts discretion to award a prevailing party taxable costs in all cases, wholly apart from the copyright-specific rule of §505.

Petitioners seek to solve that glaring superfluity problem with the remarkable (and remarkably counterintuitive) claim that the term "full" in §505 serves not to *expand*, but to *constrain*, a district court's discretion, by depriving a court of the discretion to grant anything less than all the costs that may be taxed under §1920. But that tortured reading of the statute is refuted by its plain text; just as "full" means full, "discretion" means discretion. Indeed, petitioners identify no court that has *ever* concluded that §505's *grant* of discretion to award full costs actually constrains the court from awarding anything less than all the costs available under §1920. That presumably

explains why the United States cannot bring itself to embrace this bizarre result. *See* U.S.Br.28 n.7.

Petitioners alternatively suggest that it is not the word "full," but the word "costs," that constrains a district court's discretion, because there is a well-settled "tripartite taxonomy" under which Congress uses the word "costs" to refer only to costs taxable under §1920; "fees" to refer only to professional services; and "expenses" to refer only to things that are neither "costs" nor "fees." That imagined "tripartite taxonomy" has no grounding in the U.S. Code. The Code is littered with statutes that defy this supposed trichotomy, by, *inter alia*, referring to attorneys' fees "*as part of the costs*," or authorizing the award of "costs and expenses, including attorney's fees." Petitioners' tripartite theory is likewise incompatible with the plain text of both §505 and §1920. Section 505 grants courts discretion to "award a reasonable attorney's *fee* to the prevailing party *as part of the costs*." 17 U.S.C. §505 (emphases added). And §1920 describes five of its six categories of "taxable costs" as "fees." 28 U.S.C. §1920(1)-(5).

While the government does not embrace petitioners' "tripartite taxonomy," it still insists that §505's reference to "costs" means only those costs taxable under §1920. In its view, then, §505 simply grants courts the same discretion to award the same costs in copyright cases that courts possess in every case under §1920. But by that reading, as the government openly concedes, "the word 'full' has no practical significance." U.S.Br.14. In fact, the superfluity problem is even greater, as the government's reading would leave the entire grant of

authority in the first sentence of §505 with *no* work to do. After all, if "full costs" really just means "all taxable costs," and courts already have discretion under §1920 to grant prevailing parties all their "taxable costs," then Congress was wasting its breath not only with the word "full" in §505, but with its broader authorization to award "full costs" in §505 (and in multiple subsequently-enacted statutes).

Petitioners argue that interpreting "full costs" to include nontaxable costs would render the second sentence of §505 superfluous. But that ignores both the "American Rule" for attorneys' fees and the fact that Congress added the second sentence to the Copyright Act to clarify the continued availability of attorneys' fees precisely when courts began to transition to that now-dominant rule. The 1909 Congress' explicit inclusion of attorneys' fees amidst a mounting tide in federal law *against* awarding such fees thus was hardly superfluous, but rather clarified that "full costs" continued, just as it always had, to mean *full* costs.

With nothing in the text to support them, petitioners insist that a trilogy of this Court's cases somehow compels the Court to read "full costs" to mean only "taxable costs." But none of those cases involved the term "full costs," and none provides a basis for ignoring the canon against superfluity. To the contrary, each of those cases *relied* on that canon in rejecting alternative readings that would have created less glaring superfluity problems than the alternatives urged here.

Nor does history support petitioners' position. Petitioners suggest that "full" was the term early

legislatures used in contradistinction to "double," "treble," or "quarter" costs, but that is incorrect. When legislatures wanted to distinguish all costs from some greater or lesser amount, they used the term "single costs." Congress used that term as early as the First Judiciary Act and continues to do so today. Petitioners alternatively suggest that "full costs" had a "well-established" meaning of only "costs between party and party," not "costs between solicitor and client." But that contention is belied by the many early federal and state cost-shifting laws that allowed for recovery of attorneys' fees before the "American Rule" took hold. Surely Congress did not use the term "full costs" in 1831 to signify that copyright litigants could get something *less* than what was available in other contexts at the time. And subsequent developments in English law cannot change the meaning of the 1831 Copyright Act or explain why Congress subsequently underscored the continued availability of attorneys' fees, repeatedly re-enacted the "full costs" language in the Copyright Act, and used that language in multiple other contexts as recently as 1998.

In the end, then, petitioners are left to resort to policy arguments as a basis for ignoring plain text and glaring superfluity problems. Nothing in the statute, settled canons, or this Court's cases gives this Court license to accept petitioners' invitation. In all events, policy considerations favor reading "full" to mean full, rather than nothing at all. Petitioners invoke a policy interest in "consistency" among federal intellectual property laws, but consistency in outcomes in the face of differences in statutory text is hardly an interpretative virtue. And as this Court has repeatedly recognized, copyright and patent laws are

pointedly different when it comes to remedies and costs. The Copyright Act alone provides for statutory damages, and the Copyright Act alone authorizes the recovery of attorneys' fees broadly, not just in "extraordinary" cases. Those differences reflect Congress' considered judgment that neither litigation costs nor the difficulties attendant to proving actual damages should stand as an obstacle to vindicating copyrights. Allowing recovery of the prevailing party's "full costs," not just the subset of taxable costs awarded in all cases under §1920, is consistent with that congressional judgment and with sound copyright policy.

ARGUMENT

I. The Copyright Act's "Full Costs" Provision Authorizes Recovery Of All Litigation Costs, Not Just A Subset.

Statutory interpretation "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007). And when, as here, the text is clear, it ends there too. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). The Copyright Act provides that a court "in its discretion may allow the recovery of full costs" to the prevailing party in a copyright suit. 17 U.S.C. §505. Since 1831, each iteration of the Copyright Act has used the phrase "full costs," and Congress has employed the same phrase in multiple other statutes. "Full costs" means *full* costs; "full costs" does not mean only a subset of costs. That conclusion is compelled by the plain text, bedrock rules of statutory interpretation, historical context, and common sense.

A. The Text of the Copyright Act Is Clear.

Statutory interpretation "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009). The ordinary meaning of the word "full" is "lacking ... qualification," "containing as much or as many as is possible." *Merriam-Webster's Collegiate Dictionary* 505 (11th ed. 2003); *see also* 1 Noah Webster, *An American Dictionary of the English Language* 89 (1828) (cited at U.S.Br.27) ("having within its limits all that it can contain"). The ordinary meaning of the term "cost" is the "amount spent for something." *Cambridge English Dictionary*, https://bit.ly/2DLDx62 (last visited Dec. 12, 2018); *see also, e.g.*, III *The Oxford English Dictionary* 988 (1989) ("the price paid for a thing"; "outlay, expenditure, expense"). That "everyday meaning" is "synonymous with 'expenses,'" *i.e.*, the "expenses borne" in the course of litigating. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012) (quoting 10 Charles A. Wright et al., *Federal Practice & Procedure* §2666 (3d ed. 1998) ("Wright & Miller")). The ordinary meaning of the term "full costs," therefore, is all expenses borne. The term "full costs" in the Copyright Act thus has a clear and straightforward meaning: Courts may award a prevailing party all of its costs, not just taxable costs or some other subset of costs.

Petitioners insist that when Congress said "full costs," it actually meant only the subset of costs that may be taxed under 28 U.S.C. §1920—a generally-applicable statute that the Copyright Act neither

mentions nor cross-references—and only up to the limits set forth in 28 U.S.C. §1821—another generally-applicable statute unmentioned in the Copyright Act. But taxable costs are not full costs; they "are a fraction" of the costs a party expends in litigation. *Taniguchi*, 566 U.S. at 573. Petitioners' reading of the statute thus "effectively reads the word 'full' out of the statute," *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005), in violation of the "'cardinal principle' of interpretation that courts must give effect, if possible, to every clause and word of a statute," *Loughrin v. United States*, 573 U.S. 351, 358 (2014). After all, if courts may not award prevailing copyright litigants all categories of their costs or even 100% of their costs in a given category, then there is no sense in which §505 could be understood to give courts the discretion to award prevailing parties their "full costs."

Petitioners suggest that even if "full" means all, "costs" necessarily refers to the costs specified and delimited in §1920 and §1821. But nothing in the relevant text supports that argument. Section 505 does not cross-reference or otherwise incorporate §1920 or §1821. Nor do those provisions mention the Copyright Act. Moreover, nothing in §1920 purports to be an all-purpose definition of the term costs. *But cf.* 1 U.S.C. §§1-8 (Dictionary Act provisions applicable "[i]n determining the meaning of any Act of Congress"). Rather, §1920 simply authorizes the taxing or shifting of a relatively narrow subset of litigation costs and fees. If anything, by providing a clear statutory example of what less-than-full costs looks like (a.k.a., taxable costs), and making them available as a default matter in all litigation, §1920

underscores that when Congress used "full costs" in §505, it meant full.[4]

Moreover, if "full costs" really meant only those taxable costs already available under §1920, then it is not just the term "full," but the entire grant of discretion in §505 to "allow the recovery of full costs," that would be meaningless. Section 1920 already gives district courts discretion to award a prevailing party the costs the statute enumerates, at the rates §1821 sets forth. *See* 28 U.S.C. §1920 ("A judge or clerk of any court of the United States may tax as costs the following...."). Accordingly, if §505 did nothing more than grant district courts discretion to award what §1920 already grants them discretion to award, then there would be no need to grant courts the discretion to award *any* costs, let alone "full costs," in copyright cases.

And the superfluity problem would not end there. Congress has enacted four statutes since 1976 providing for "full costs," three granting discretion to award "full costs" and one mandating a "full costs" award. *See* 17 U.S.C. §911(f); 28 U.S.C. §4001(g); 47 U.S.C. §553(c)(2); 47 U.S.C. §605(e)(3)(B)(iii). Petitioners would render superfluous the word "full" in all four, and would render superfluous the grant of discretion to award costs in three of the four. Their reading would do so despite legislative history making

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[4] Similarly, while a "full deck of cards" plainly means all 52 cards, not a subset, that meaning becomes unmistakable if the phrase is used alongside references to a euchre deck or "face cards." Likewise, while petitioners perceive the "whole" in "whole milk" to be superfluous, Petr.Br.35 n.2, it is anything but if the whole milk sits next to the skim milk in the refrigerator.

explicit the intent to permit the award of a particular category of nontaxable costs—namely, investigative costs. *See supra* p.7. Whatever one thinks of legislative history generally, this discussion underscores the obvious public meaning of the plain text and the hazards of deviating from it. A legislator familiar with the plain meaning of "full" and wondering whether investigative costs were included within the phrase "full costs" could reach only one conclusion: that they were safely within the ambit of "full."

While the plain text and the canon against superfluity alone make clear that the "full costs" that may be recovered under §505 are not limited to taxable costs under §§1920 and 1821, the balance of the text and context of §505 reinforce that full means full, not just taxable. First, the text of §505 reinforces its compensatory purposes by allowing the court to award "the recovery of full costs." "Recovery" is a term that connotes a restoration by court judgment, *see Black's Law Dictionary* (10th ed. 2014) ("The regaining or restoration of something lost or taken away"), and when that term is used in conjunction with "full costs," it reflects a broad compensatory purpose of full restoration or recovery. That compensatory purpose—and the possibility of nontrivial recoveries—is reinforced by the exclusion of the United States from the full-cost-recovery provision, presumably in an effort to protect the federal fisc. The same purpose and possibility are underscored by the express direction of discretion to the court, in contrast to §1920, which directs the ministerial process of calculating taxable costs interchangeably to clerks or judges.

The statutory context reinforces the broader full-recovery purposes reflected in the text. Section 505 is codified immediately after the Copyright Act's basic prohibition on infringement, 17 U.S.C. §501, together with three other remedial provisions addressing injunctions (§502), impoundment (§503), and damages and profits (§504). Not only does each of those sections share a broad remedial purpose, but the title to each of the four sections begins with the common phrase, "Remedies for Infringement:" with the specific subject addressed in the section following the colon. 17 U.S.C. §§502-505. To be sure, this Court has attributed varying levels of significance to titles of statutory sections. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 221-24 (2012) (collecting cases but generally concluding that "titles and headings are permissible indicators of meaning"). But the Court routinely relies on statutory context, even in the absence of such clear linkage among allied statutory sections. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 345-46 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). And here, both the context and section titles make unmistakable that §505 and its "full costs" language were designed to ensure full recovery in copyright cases, not merely to allow taxation of the subset of costs awarded as a default in all federal litigation.

B. Petitioners' Effort to Read "Full Costs" as a Constraint on District Court Discretion Is Unavailing.

Seeking to sidestep these glaring superfluity problems, petitioners claim that the word "full" has independent meaning but does not serve to *expand* discretion, but rather "*constrains* district court discretion regarding the *amount* of taxable costs that can be awarded." Petr.Br.16-17 (first emphasis added). According to petitioners, "full" signals that while courts have discretion to award no costs, once they decide to award some costs they "have no discretion" under the Copyright Act "to award *less* than the amounts specified in Section 1821 for each of the categories in Section 1920." Petr.Br.35 (emphasis added).

That "convoluted textual argument" is "refuted by the plain terms of the" statute. *Matal v. Tam*, 137 S. Ct. 1744, 1756 & n.4 (2017). The Copyright Act provides that "the court in its discretion may allow the recovery of full costs." 17 U.S.C. §505. Just as "full" means full, "discretion" means discretion. To read a statute that explicitly confers "discretion" to award "full costs" as implicitly eliminating discretion to award anything but the maximum amount of taxable costs "would be confusing and downright silly." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018). It is no surprise, then, that the government flatly rejects this atextual argument. *See* U.S.Br.28 (courts under the Copyright Act may "award full costs, no costs, *or any amount in between*") (emphasis added).

The government makes the half-hearted argument that "full" *may* have served a marginal purpose before the Copyright Act was amended in 1976 to make the award of full costs discretionary rather than mandatory, because "a court might have thought itself obligated to award *some* costs in every suit, but free to award less than the entire taxable amount." U.S.Br.28. But even accepting that dubious premise, it would still mean, as the government candidly admits, that "the word 'full' has no practical significance" now, and ceased having any meaning in 1976. U.S.Br.14. That leaves the government with no explanation for why Congress *retained* the term "full costs" when it specifically revised the cost-shifting provision in 1976. It also leaves the government with no explanation for why Congress has enacted three other statutes, all since 1976, that give district courts "discretion" to grant a prevailing party its "full costs." *See* 17 U.S.C. §911(f); 28 U.S.C. §4001(g); 47 U.S.C. §553(c)(2)(C). If the government's theory were correct, each of those statute's grant of discretion to award "full costs" was superfluous the day it was enacted.

That is reason enough to reject the United States' position. "The canon against surplusage is not an absolute rule," *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 385 (2013), but it certainly applies where multiple sentences in multiple enactments would be rendered nugatory, and "where a competing interpretation gives effect 'to every clause and word of a statute.'" *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 107 (2011). And here, there is a readily available reading that gives every word of the statute "real and substantial effect." *Husted*, 138 S. Ct. at 1844-45.

When Congress said "full costs," it meant nontaxable, as well as taxable, costs.

C. "Costs," "Expenses," and "Fees" Are Not the Distinct Terms Petitioners Suggest.

1. Unable to reconcile their interpretation of the statute with Congress' inclusion of "full," petitioners instead try to narrow the meaning of "costs." Although §1920 by its terms does not purport to provide an all-purpose definition of costs, petitioners contend that "costs," "fees," and "expenses" are distinct and mutually exclusive terms of art: "Costs" refers *only* to the costs that "[a] judge or clerk ... may tax" under §1920; "fees" refers *only* to "the amounts charged by professional service providers"; and "expenses" refers *only* to "expenditures other than costs and fees." Petr.Br.20. Petitioners thus insist that §505's reference to "costs" necessarily means only costs taxable under §1920, and that a statute that does not refer to "expenses" or "fees" cannot be read to authorize recovery of payments to professionals or any other nontaxable costs. Petr.Br.21-25.

This supposedly "foundational statutory architecture," Petr.Br.25, finds no grounding in the U.S. Code. "Many federal statutes providing for attorney's fees continue to specify that they are to be taxed and collected as 'costs.'" *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201 (1988); *see also Marek v. Chesny*, 473 U.S. 1, 43-45 (1985) (Brennan, J., dissenting) (counting 63 federal statutes "that refer to attorney's fees '*as part of the costs*,'" plus "[a] number of [others]" that "authorize the award of 'costs and expenses, including attorney's fees'") (emphasis omitted). In fact, §505 is one of them: It provides that

"the court may also award a reasonable attorney's fee to the prevailing party *as part of the costs*." 17 U.S.C. §505 (emphasis added). That is not a contradiction in terms, or even an imprecise use of language. Rather, it is a commonsense recognition that the fees charged by an attorney are a litigation expense that are recoverable when a statute overcomes the presumption created by the "American Rule."

Section 1920 likewise eviscerates petitioners' effort to treat costs, fees, and expenses as mutually exclusive categories. Five of the six categories of "costs" that §1920 enumerates are expressly described as "fees." *See* 28 U.S.C. §1920(1)-(5). The only category that is not termed a "fee"—costs for "court appointed experts" and "interpreters," *id.* §1920(6)—is the only category that petitioners' theory says is a "fee" but not a "cost," as experts and interpreters are classic "professional service providers." Petr.Br.20. And §1920 is not alone in this regard. 28 U.S.C. §1923, which sets how much courts may charge for docketing certain cases in federal court (a "cost" in petitioners' supposed trichotomy), calls those charges "docket fees." 28 U.S.C. §1828, which governs reimbursements for special interpreters, who are certainly "professional service providers" who charge "fees," Petr.Br.20, calls those charges "expenses." 28 U.S.C. §1821, which petitioners claim supplies the quantitative limit of "costs," Petr.Br.20, calls the amounts that may be recovered "under th[at] section" "fees." And so on.

In short, the Code does not remotely reflect some careful trichotomy, or some artificial notion that "costs" always means taxable costs and "fees" always

means fees for professional services. Instead, fees, costs, and expenses are used interchangeably, with the precise meaning depending on context.

2. While the United States does not embrace petitioners' "tripartite taxonomy," Petr.Br.15, it advances a junior-varsity version of the same argument, insisting that the word "costs," as used in federal statutes, "encompasses only the limited subset of expenditures that are listed in Section 1920." U.S.Br.5. Thus, in its view, "the adjective 'full' ... simply authorizes courts to give prevailing litigants the entire amount of their taxable costs." U.S.Br.5. Of course, as already explained, that position has no grounding in the text of §1920 and suffers from fatal superfluity problems at multiple levels, rendering the word "full," the entire first sentence of §505, and several subsequently enacted federal statutes superfluous.

But the difficulties with the government's position do not end there. If "costs" really did mean only those costs taxable under §1920, then the term "taxable costs" would be redundant and the term "nontaxable costs" would be an oxymoron. Yet both terms have long been commonplace and continue to be used without confusion. *See, e.g.*, Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs...."); Fee Act §1 (attorneys may charge clients for services "in addition to the taxable costs"); *cf. Taniguchi*, 566

U.S. at 575 (noting that courts understand "the line between taxable and nontaxable costs").[5]

Indeed, the Copyright Act *itself* used the term "taxable costs" alongside the term "full costs" for decades. In 1909, Congress extended copyright protections to include the exclusive right to publicly perform copyrighted musical compositions for profit. 1909 Act §1(e). The 1909 Act further conferred upon composers the right "to make any arrangement or setting of [a copyrighted work in music] or of the melody of it in any system of notation or any form of record." *Id.* While this provision gave composers protection from unauthorized recording of their unreleased works, Congress decided that if a composer chose to license one manufacturer to make mechanical reproductions of his works, then others would be allowed to record those works upon payment of a two-cent-per-work statutory royalty. And when a composer brought suit and established that the royalty was not paid, Congress provided that "the court *may* award *taxable costs* to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum ... not exceeding three times" the royalty owed. *Id.* (emphasis added). That provision was added in the

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[5] Presumably, even petitioners would have to concede that if §505 followed the model of Rule 23(h) and authorized the award of "nontaxable costs" rather "full costs," respondents could recover their nontaxable costs. But "nontaxable costs," like "taxable costs," are self-evidently a subset of "full costs." Thus, petitioners embrace the absurdity that by using the broader term "full," rather than the narrower term "nontaxable," Congress authorized fewer costs.

same 1909 Act that re-enacted the then-mandatory "full costs" provision for infringement actions.[6]

Not only does that confirm that Congress has long known the difference between "full costs" and "taxable costs," *Firstar Bank, N.A. v. Faul*, 253 F.3d 982, 991 (7th Cir. 2001) ("different words within the same statute should, if possible, be given different meanings"), it also belies any suggestion that "costs" and "taxable costs" are always one and the same, such that taxable costs is redundant. In reality, the terms "taxable costs" and "nontaxable costs" are entirely sensible terms that are routinely applied exactly how the average English-speaker would understand them.

Finally, petitioners and the government also face the considerable problem that their position is not as simple as arguing that "costs" necessarily refers to those categories of costs taxable under §1920. Rather, their argument features silent cross-references to both §1920 *and §1821*, such that a prevailing party under §505 does not even have the possibility of recovering the full amount of its costs for the categories of costs and fees taxable under §1920. Instead, in their view, even for those taxable categories of costs, courts may award only "the amounts specified *in Section 1821*." Petr.Br.35 (emphasis added); *see also* U.S.Br.9. Thus, rather than read "full costs" to mean what it says, petitioners and the government are left with the

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[6] That Congress awarded a limited universe of costs and made their award discretionary in this unpaid royalty context thus makes sense as a policy matter, as Congress limited remedies for unpaid royalties while allowing the full suite of remedies (including mandatory full costs) for composers who declined to license their works at all.

utterly atextual argument that "full costs" means a less-than-full portion of a less-than-full subset of costs. And they accomplish all this without an explicit cross-reference to either §1920 or §1821, and at the expense of rendering the word "full" and the first sentence of §505 superfluous. "There is no plausible reason why Congress would enact the provision that [petitioners and the United States] envision." *Husted*, 138 S. Ct. at 1844.

D. Giving §505 its Plain Meaning Does Not Create Any Superfluity.

Petitioners suggest that some degree of superfluity is inevitable under any reading of §505. In particular, they contend that if "full costs" does *not* mean just taxable costs, then the second sentence—"the court may also award a reasonable attorney's fee to the prevailing party as part of the costs"—is "entirely pointless" because attorneys' fees would already be subsumed in costs. Petr.Br.26-27. But that argument ignores the American Rule and mistakes clarity for superfluity. Given the historical context in which language designed to assure the continued shifting of attorneys' fees was added to the statute, the clarity provided by the second sentence of §505 is hardly superfluous.

Unlike the present version of §505, the original cost-shifting provision in the 1831 Copyright Act did not specify that "full costs" included attorneys' fees. Instead, it simply provided that "full costs shall be allowed." 1831 Act §12. That is unsurprising, because despite petitioners' contrary claims, "[a]t common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party." *Budinich*, 486 U.S.

at 200. That practice prevailed in the United States at the Founding, and was reflected in early state and federal cost-shifting statutes.[7] In short, when early "costs statutes were being enacted in America," it "was well established" that the "costs" to be "awarded as of course to the winning party" included "substantial sums to defray fees for solicitors and counsel." Comment, *Distribution of Legal Expense Among Litigants*, 49 Yale L.J. 699, 700 (1940); *see also, e.g.*, *Baez v. U.S. Dep't of Justice*, 684 F.2d 999, 1002 (D.C. Cir. 1982) ("American courts adopted English practice by the early part of the nineteenth century, typically giving total reimbursement, including attorneys' fees, to the prevailing litigant.").

On occasion, an attorneys' fees award that was not grounded in a specific grant of statutory authority was rejected. *See Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796). But in the first half of the nineteenth century, this Court and its members repeatedly recognized that U.S. courts generally followed the rule that attorneys' fees could be recovered. *See, e.g.*, *The Appollon*, 22 U.S. (9 Wheat.) 362, 379 (1824); *see also Bos. Mfg. Co. v. Fiske*, 3 F. Cas. 957 (C.C.D. Mass. 1820) (Story, Circuit Justice) (concluding that *Arcambel* did not compel rejection of attorneys' fees award in a patent case). Congress thus had no need to specify in the 1831 Copyright Act that "full costs" included reasonable attorneys' fees; "full costs" alone sufficed to make that clear at the time.

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[7] *See, e.g.*, 1793 Act §4; 1795 Act ch. 28; 1796 Act ch. 11; Rev. Stat. of N.Y., pt. III, ch. X, tit. I, §31 (1846-1848); Rev. Stat. of the Commonwealth of Mass., pt. III, tit. VI, ch. 121, §32 (1836); Rev. Stat. of the State of Mich., pt. III, tit. 5, ch. 1, §§8, 11 (1837).

Over the second half of the nineteenth century, however, that understanding eroded in the United States, as the American Rule, under which each party generally bears his own attorneys' fees, gained force. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & Contemp. Probs. 9, 17 (1984). Consistent with that newly prominent "rule," courts in the late-nineteenth century began reading cost-shifting statutes "to avoid recovery of attorney fees as costs" unless the statute expressly said otherwise. *Id.* at 22-23.

It was against this changing backdrop that Congress amended the Copyright Act's cost-shifting provision in 1909 to reiterate that "full costs shall be allowed," and to add, for the first time, "*and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.*" 1909 Act §40 (emphasis added). Far from being superfluous, that language served an important purpose: "Congress included it to remove doubt," *Marx*, 568 U.S. at 385, that intervening developments had created as to whether "full costs" included attorneys' fees. Providing such clarity, and obviating the need for the courts to address contentions of ambiguity, does not implicate the canon against superfluity. *Id.* There is a fundamental difference between a statutory provision that clarifies what might otherwise be doubted and an interpretation that reads the word "full" out of the statute and renders an entire sentence (and multiple other statutory provisions) superfluous.

Moreover, by expressly including attorneys' fees "as part of the costs" to be awarded, Congress removed that doubt about the ability to recover attorneys' fees

in a manner that squarely refutes the notions that "costs" can never include "fees," and that the "costs" in the first sentence of §505 refer only to taxable costs. In short, when confronted with the question of whether it intended prevailing copyright parties to receive their "full costs" or only some narrower subset of costs, Congress answered emphatically in favor of "full costs" including attorneys' fees. And Congress has hewed to that view ever since.

II. The Plain-Text Reading Of §505 Is Entirely Consistent With This Court's Precedent.

Unable to establish that "full costs" means something less than "full costs" as a textual matter, petitioners insist that a "trilogy" of this Court's cases compels that conclusion. Petr.Br.28-32. But none of those cases involves the term "full costs." Two did not even interpret the word "costs," let alone "full costs," and all three *invoked* the canon against superfluity. Those cases thus provide no meaningful support for petitioners' effort to read "full" to mean nothing at all.

1. The first decision in petitioners' trilogy, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), involved whether Federal Rule of Civil Procedure 54(d) authorizes courts to award costs "above and beyond" those set forth in 28 U.S.C. §§1920 and 1821. *Id.* at 441. At the time, Rule 54(d) provided that "costs shall be allowed as of course to the prevailing party," "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules." Fed. R. Civ. P. 54(d) (1961). Then, as now, §1920 authorized federal courts and clerks to "tax as costs" "[f]ees for ... witnesses," 28 U.S.C. §1920(3), but §1821(b) imposed a "$30-per-day

witness fee limit," *Crawford Fitting*, 482 U.S. at 439. The petitioners argued that Rule 54(d) overrode that limit, but this Court disagreed. The Court concluded that §1920 "defines the term 'costs' as used in Rule 54(d)," *id.* at 441, and that "absent contract or explicit statutory authority," "a federal court is bound by the limits of §1821(b)," *id.* at 437.

Given that Rule 54(d) came long after §1920 but did not purport to overrule it, that conclusion not only was "logical," but was necessary to avoid a glaring superfluity/implied-repeal problem. If Rule 54(d) authorized costs "above and beyond" the amounts specified in §1920 and §1821, then those more "specific congressional enactment[s] on the shifting of litigation costs" would be "of no moment." *Id.* at 444. This Court rejected that result, reiterating that it "will not lightly infer that Congress has repealed" a prior law. *Id.* at 445.

At the same time, however, the Court readily acknowledged (as Rule 54(d) expressly recognizes) that Congress is free to expand the universe of recoverable costs by a separate, more specific statute, and that courts must respect "congressional intent to supersede" §1920 and §1821. *Id.* But *Crawford Fitting* addressed the interaction of a generally-applicable federal rule with two equally generally-applicable statutes, and declined to read the latter as superfluous. Thus, the rule set forth in *Crawford Fitting* is straightforward: In cases implicating only generally-applicable Rule 54(d) and not a specific statute, a prevailing party can recover only the categories of costs taxable under §1920. But when

costs are authorized by a separate statute, that separate statute controls.

That is precisely the case here. Costs in a copyright action are governed by the Copyright Act's "full costs" provision. To conclude that prevailing copyright litigants nonetheless may recover only what is generally available under §1920 and what would they receive if §505 were not on the books would create exactly the problem *Crawford Fitting* sought to avoid: It would render the "specific congressional enactment on the shifting of litigation costs" in copyright cases "of no moment." *Id.* at 441-42, 445.

2. The next case in petitioners' trilogy is *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991). *Casey* did not involve how to interpret the word "costs" (let alone the term "full costs"). Instead, it involved only how to interpret the term "attorney's fees." The statute at issue there, 42 U.S.C. §1988, allowed prevailing parties to recover "a reasonable attorney's fee as part of the costs." 499 U.S. at 83. The question before the Court was whether the phrase "a reasonable attorney's fee" also included "fees for services rendered by experts." *Id.* The answer was straightforward. "Attorney's fees" refer to the fees paid *to attorneys*, and experts are not attorneys. While the more general term "fees" may well capture both, the Court concluded that reading the more specific term "attorney's fees" to encompass expert fees would read "attorney's" out of the statute. *Id.* at 92.

That holding might foreclose an effort to recover certain costs if the *second* sentence of §505 stood alone. But it does not. The question here is whether the term "full costs" in the *first* sentence of §505 grants courts

discretion to award prevailing parties their full costs. As to that question, *Casey* only fortifies the conclusion that "full" cannot be read out of the statute. Just as reading "attorney's fees" to include all professional fees would blue-pencil "attorney's" out of §1988, reading "full costs" to mean only those costs already available under §1920, as limited by §1821, would read "full" out of §505. Far from supporting petitioners' position, then, *Casey* affirmatively undermines it.

3. Petitioners' final case, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006), is no more helpful to them. *Murphy* involved whether an attorneys'-fees-shifting statute virtually identical to the one in *Casey* permitted recovery of expert fees. *Id.* at 294; *compare* 20 U.S.C. §1415(i)(3)(B) (permitting "reasonable attorney's fees as part of the costs"), *with* 42 U.S.C. §1988 (permitting "a reasonable attorneys' fee as part of the costs"). The principal difference asserted was the presence of some legislative history favoring a broader construction of the text, which ultimately did not move a majority of the Court. As in *Casey*, the Court held that the statute did not authorize recovery of expert fees, reasoning once again that "the term 'attorneys' fees,' standing alone, is generally not understood as encompassing expert fees." *Murphy*, 548 U.S. at 303. Again, that holding has no bearing here.

Indeed, *Murphy* is (if possible) even less relevant here because it involved whether plaintiffs could recover expert fees against state officials *under spending power legislation*. *That* is why the Solicitor General urged, and the Court applied, a "clear

statement" rule in that case, reasoning that states must be given "clear notice" if they were expected to take on such an obligation. *Id.* at 300, 324. Section 505, by contrast, is an exercise of Congress' constitutional power to make copyright law, *see* U.S. Const. art. I, §8, cl. 8, a context in which no comparable "clear statement" rule applies. In all events, neither *Murphy* nor *Casey* held that a prevailing plaintiff cannot recover expert fees (or other costs not taxable under §1920, such as e-discovery costs) when, as here, a statute expressly authorizes recovery of "full costs." Instead, they simply refused to give the term "attorney's fees" an "open-ended" interpretation that contradicted text, history, and logic. *Murphy*, 548 U.S. at 297. That hardly supports adopting an equally atextual, ahistorical, and illogical interpretation of §505 here.

III. Historical Context Confirms That "Full Costs" Means Full Costs.

With no explanation for what work "full costs" is doing in §505 today, petitioners invoke a variety of historical arguments to buttress their theory that neither "full" nor the first sentence of §505 (or the multiple recently-enacted statutes that use the same term) has any contemporary relevance. According to petitioners, "full costs" historically meant, alternatively, whatever state law provided, single costs, or nothing at all. But the historical record in this country and the English practice as of 1831 affirmatively refute petitioners' theories. And in all events, nothing in the murky historical record is remotely sufficient to disregard the clear text of the copyright laws, which have provided for "full costs"

both before the 1853 Fee Act and long after petitioners can attribute any meaning to that term.

A. "Full Costs" Did Not Have Any of the Various Meanings Petitioners Try to Give it in 1831.

1. Petitioners first suggest that "full costs" was shorthand in 1831 for "costs taxed pursuant to a statutory schedule." Petr.Br.40. But even petitioners agree that there was no default federal "statutory schedule" when Congress first provided for the recovery of "full costs" in copyright cases in 1831.

Petitioners try to solve that problem by maintaining that the 1831 Copyright Act was meant to incorporate *state* "statutory schedules." Petr.Br.40. But Congress was well aware in 1831 of how to incorporate state-law costs provisions into a federal cost-shifting statute, yet it did not do so in the Copyright Act. The 1793 Act and its successors did exactly that, providing that prevailing parties shall "be allowed ... such compensation for their travel and attendance, and for attornies and counsellors' fees ... *as are allowed in the supreme or superior courts of the respective states.*" 1793 Act §4 (emphasis added); *see also* 1795 Act ch. 28; 1796 Act ch. 11. Congress likewise did not shy away from being explicit when it wanted to incorporate state law after 1831. *See* Act of Mar. 3, 1841, ch. 35, §1, 5 Stat. 421, 427 ("it shall and may be lawful for the United States clerks, attorneys, counsel, and marshals ... to demand and receive the same fees that now are, or hereafter may be, allowed by the laws of the said States").

That is manifestly *not* the approach Congress took in the Copyright Act. Instead, it provided: "In all

recoveries under this act, ... *full* costs shall be allowed thereon, *any thing in any former act to the contrary notwithstanding*." 1831 Act §12 (emphases added). Petitioners cannot explain why this Court should interpret a statute that expressly rejected the approach of earlier federal costs statutes as nonetheless silently incorporating them.

Nor can they explain how it is that the Copyright Act purportedly shifted from incorporating state law during its first 22 years of life to later incorporating the 1853 Fee Act, despite repeated re-enactments of the copyright-specific "full costs" regime. Indeed, even as subsequent Congresses failed to make adjustments for inflation, *compare* 28 U.S.C. §1923(a) (authorizing "$2.50 for each deposition admitted in evidence"), *with* Fee Act §1 (same), Congress re-enacted the "full costs" language in the copyright context. There is no indication that any of the Congresses that re-enacted the "full costs" language in subsequent iterations of the Copyright Act (or used the term "full costs" in other statutes) thought that it really meant "only those costs available under the Fee Act or its successors." In reality, the very fact that Congress repeatedly retained the term "full costs" even as it completely overhauled the Copyright Act—and indeed made manifestly clear in 1909 that the "full costs" provision was broader than the Fee Act—is itself compelling evidence to the contrary.

Petitioners' argument is also at odds with other cases from this Court involving the Fee Act, as the Court has repeatedly refused to read the Fee Act as impliedly repealing courts' pre-existing equitable powers to "gran[t] reimbursement for the costs of

litigation other than the conventional taxable costs" in certain circumstances. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (collecting cases demonstrating that "the 1853 [Fee] Act was read as not interfering with [this] historic power of equity"). Given that this Court did not read the Fee Act to displace judge-made principles of equity, it would be remarkable to read that same Act as displacing a repeatedly re-enacted federal *statute* erecting a copyright-specific rule for costs recovery.

2. The second problem with petitioners' theory is that the very state "statutory schedules" that they maintain Congress meant to incorporate by inference were *not* confined to the "ordinary (or 'party and party') costs" that petitioners insist was all "full costs" ever meant. Petr.Br.40. Many state laws expressly allowed for recovery of attorneys' fees in 1831. *See supra* pp.29-30 & n.7. The very state statute petitioners identify as their seminal example of how costs purportedly were "strictly limited" to costs "*as between party and party*," Petr.Br.38, expressly allowed for recovery of attorneys' fees. *See* Rev. Stat. of N.Y., pt. III, ch. X, tit. I, §7.2 (1846-1848). Congress itself also recognized that states allowed attorneys' fees when it provided in the 1793 Act that a prevailing party could recover "attornies and counsellors' fees ... as are allowed in the supreme or superior courts of the respective states." 1793 Act §4. And even the 1853 Fee Act provided for the recovery of attorneys' fees, while limiting the amounts taxable to the losing party. *See, e.g.*, Fee Act §1 (authorizing recovery of $5 per day for district attorney in criminal cases and in all cases for $2.50 for every deposition admitted into evidence).

Thus, even on petitioners' own theory of what Congress was trying to accomplish in 1831, it was anything but "well-established" that "full costs" meant only "party and party" costs at that juncture. Petr.Br.40. To the contrary, Congress' decision to expressly clarify that "full costs" included "a reasonable attorney's fee" in 1909 strongly suggests precisely the opposite: Congress *always* intended "full costs" to include *all* of a prevailing party's costs, not just "ordinary (or 'party and party') costs taxed pursuant to a statutory schedule." Petr.Br.40.

3. Shifting gears, petitioners maintain that Congress borrowed the term "full costs" from state laws that used it not to indicate that the full range of costs were recoverable, but "simply in contrast to [allowing for] double, treble, 'two thirds,' ... or even 'one quarter'" of costs. Petr.Br.39; *see also* U.S.Br.17-18. But that is not how state statutes used the term "full costs." When states wanted to contrast single costs from multiple or fractional costs, they used the term one would expect: "single costs." Each of the state statutes petitioners reference did exactly that. *See* Rev. Stat. of N.Y., pt. III, ch. X, tit. I, §29 (1846-1848) ("[w]henever ... a plaintiff shall be entitled to recover double or treble the damages assessed by a jury, ... he shall recover single costs only in such suit"); Rev. Stat. of the Commonwealth of Mass., pt. III, tit. VI, ch. 121, §18 (1836) ("In all cases, in which any party is entitled to recover double costs, the sums paid as fees to witnesses, and for the costs of taking depositions and procuring evidence, and for copies,

and all court dues, shall be taxed and recovered singly....").[8]

More damning still, Congress itself used the term "single," not "full," in contrast to "double costs" as early as 1789. *See* Judiciary Act of 1789, ch. 20, §23, 1 Stat. 73, 85 (identifying circumstances in which courts "shall adjudge or decree to respondent in error just damages for his delay, and single or double costs at their discretion"). And Congress has continued to do so ever since. *See, e.g.*, 28 U.S.C. §1912 ("Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."); Fed. R. App. P. 38 (allowing award of "just damages and single or double costs" in frivolous appeals). So, too, has this Court. *See* Sup. Ct. R. 42.2 (allowing award of "just damages, and single or double costs" for frivolous petitions for certiorari). Neither petitioners nor the United States can identify even one statute—state or federal—that *ever* used the term "full costs" "in contrast with provisions that adjusted the amount of costs awardable." U.S.Br.17.

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[8] The same is true of the bulk of the state statutes the government cites. *See* U.S.Br.17 & n.1. To the extent they used any term in contradistinction to "double," "treble," "half," or "quarter" costs, it was "single," not "full." *See, e.g.*, Rev. Stat. of the State of N.Y., pt. III, ch. X, tit. I, §23 (1829) (plaintiff who recovers "double or treble damages" "shall recove[r] single costs only"); *id.* §25 (even if defendant recovered "double or treble costs," counselors, witnesses, and jurors could receive "only the single costs allowed by law"); Rev. Stat. of the State of Mich., pt. III, tit. 5, ch. 1, §§9, 11 (1837) (same); Rev. Stat. of the State of Wisc., tit. XXIX, ch. 131, §§11, 13 (1849) (same).

Finally, petitioners' theory as to why Congress enacted the 1831 Copyright Act does nothing to solve the superfluity problem. According to petitioners, the "express" purpose of the 1831 Copyright Act was to displace a provision of the First Judiciary Act under which a prevailing plaintiff could recover *no* costs, and could be required to pay the *defendant*'s costs, if his damages were less than $500. Petr.Br.40-41 (citing 1 Stat. 73, 83).[9] But as the government acknowledges, that theory does nothing to explain why Congress used the term "full costs." After all, "[i]f the 1831 Act's cost-shifting provision had that effect, ... it was not because that law allowed plaintiffs to recover their 'full costs.'" U.S.Br.28 n.7. Instead, it was because the 1831 Copyright Act "made cost awards mandatory 'in all recoveries under this act.'" *Id.* Under petitioners' theory, then, the word "full" was *never* doing any work in the statute.

The United States at least tries to explain what the term meant, suggesting that because the statute provided that full costs "shall" be awarded, "a court might have thought itself obligated to award *some* costs in every suit, but free to award less than the entire taxable amount," if Congress did not specify that it meant "full costs." U.S.Br.27-28. But the United States does not identify any evidence to support this made-for-litigation theory, which in all

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[9] Notably, petitioners get this theory not from the legislative history of the 1831 Copyright Act, but from the legislative history of the Copyright Act *of 1909*. Petr.Br.40-41. And even petitioners are forced to concede (with considerable understatement) that legislative history from 78 years later "might not reflect the intent of the 1831 Congress." Petr.Br.41-42.

events seems inconsistent with its broader theory that "costs" always and everywhere means the categories and limitations on costs set forth in §1920 and §1821. This theory is also inconsistent with the reality that Congress' failure to include the word "full" in the Patent Act and Lanham Act, each of which provides that "costs" "shall" be awarded, *see* 35 U.S.C. §284; 15 U.S.C. §1117, has not been understood to leave courts free to award something less than all of a prevailing party's taxable costs. Try as they might, then, petitioners and the United States simply cannot point to anything in the history of the Copyright Act that would justify ignoring its plain text.

B. "Full Costs" Was Not Limited to "Party and Party" Costs in England in 1831.

Petitioners' efforts to find support across the Atlantic fare no better. Petitioners claim that "'full costs' had a well-established meaning" in *English* practice that included only "ordinary (or 'party and party') costs taxed pursuant to a statutory schedule." Petr.Br.40. But while "full costs" did indeed have an ordinary meaning in England, that is not what it was in 1831 and before. "Full costs" referred historically to *all* costs, not just (as petitioners would have it) "costs between party and party."

Since at least as early as the Statute of Gloucester, 6 Edw. I., c. 1 (1278) (Eng.), a prevailing party in England could recoup a broad suite of litigation expenses. As Lord Coke catalogued, courts consistently applied the statute to allow plaintiffs to recover "all the legall cost of the suit," except for their "travell and losse of time." Coke, *supra*, at 288. Thus, "'costs' under the English system included not merely

the fees which the party has had to pay to the officers of the court at the different stages of the litigation, but likewise the fees which he has had to pay to his own lawyers," as well as various "other expenses of preparing his case for trial." McCormick, *supra*, at 235; *see also, e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 457 (3d Cir. 2000) ("The cardinal principle of the English system was one of total reimbursement."); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 164 (3d Cir. 2012) (describing 1853 Fee Act as a "'depart[ure] from the English practice of attempting to provide the successful litigant with total reimbursement'" (quoting Wright & Miller §2665)).[10]

Copyright cases were no exception. Consistent with the Statute of Gloucester, the Statute of Anne proceeded on the understanding that a prevailing copyright plaintiff, like any other prevailing plaintiff, could recover all of its costs. And like other contemporary laws, *see, e.g.*, 23 Hen. VIII, c. 15 (1531) (Eng.); 4 JAC. I, c. 3 (1607) (Eng.); 8 Eliz., c. 2 (1566) (Eng.), the Statute of Anne took cost-shifting one step further, providing that a prevailing *defendant* could also broadly recover its costs in a copyright case. To accomplish that result, the Act provided that a prevailing defendant could recover its "full costs." *See* 8 Anne, c. 19, §8 (1710) (Eng.). By doing so,

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[10] Because costs recovery in Gloucester-era England was a creature of legislation, Parliament could restrict or expand the default right to full recovery if it saw fit. *See, e.g.*, 21 JAC. I, c. 16, §6 (1623) (Eng.) (slander plaintiffs could receive no more costs than damages when they recovered less than 40 shillings). But absent such express rules, all costs were recoverable. *See Witham*, 95 Eng. Rep. at 703 (awarding all costs where statute providing cause of action was silent on the issue).

Parliament made clear that *whichever* party prevailed could recover all of its costs.

Petitioners tell a very different story, insisting that it was "well-established" in England that a prevailing party could recover only "costs between party and party," even if a statute allowed for recovery of "full costs." Petr.Br.2-4. But petitioners neglect to mention that the "between party and party" rule they invoke was a *departure* from the Gloucester regime that did not take hold until the mid-1800s—after the 1831 Copyright Act and more than a century after the Statute of Anne.

The middle of the nineteenth century was a time of great turmoil for costs-recovery rules in England. This is well illustrated by the 1853 treatise upon which petitioners rely, which begins by explaining that the author had to discard all past treatises and begin his analysis from scratch because sources written just a few decades earlier were now "practically obsolete." John Gray, *A Treatise on the Law of Costs* iii (1853); *see also* "Gray's Law of Costs," in *Catalogue of Law Works Published by Messrs. Butterworth* 15 (1856) (lauding Gray's treatise in light of "the various changes which the law has recently gone"). Some of these changes were brought about through cases that adopted increasingly narrow conceptions of what costs could be recovered. But the most important changes came from Parliament, which began by enacting a law in 1842 that expressly repealed all statutes that allowed for anything more than "Costs between Party and Party," and replaced them with a default rule that a prevailing party could recover only "Costs between Party and Party ... *and*

no more." Limitations of Actions and Costs Act, 5 & 6 Vict., c. 97 (1842) (Eng.) (emphasis added).

Petitioners mention none of this history, which shows that the sort of explicit verbiage they claim was necessary to shift costs beyond those between party and party (*e.g.*, "full costs *and expenses*" or "all costs, *charges, and expenses*," Petr.Br.3) did not become necessary in England until well after the Statute of Anne and after 1831. Indeed, that language itself comes straight out of Parliament's 1842 Act, and each of the statutes petitioners identify as using it was enacted *after* that seminal change in the law.

That history makes it understandable (and highly problematic for them) that petitioners cannot identify a single source *before* 1831 that interpreted the term "full costs" to mean only "party and party costs." The best they can muster is *Irwine v. Reddish* (1822), 106 Eng. Rep. 1382 (K.B.), which concluded that "no distinction is known in the law between costs and full costs." *Id.* at 1383. But even if the British judge who authored the per curiam opinion in *Irwine* was a faint-hearted textualist, it is of no moment because *Irwine* never addressed the question of what costs came within the term "full costs" in 1822, at a time when the British concept of costs unmodified was still inclusive. Thus, *Irwine* is irrelevant in interpreting the 1831 Copyright Act or in determining whether "full costs" was then understood in England as limited to "party and party costs."[11]

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[11] *Irwine* involved whether a statute that empowered a judge to reduce a prevailing party's "costs" by certificate if the party recovered less than 40 shillings applied to a statute that provided for "full costs." 106 Eng. Rep. at 1382. The courts had already

It was not until several decades later (and several decades after the 1831 Copyright Act) that English courts began suggesting that "full costs" meant only "party and party" costs (and, oddly, invoking *Irwine* for that proposition). *See, e.g., Jamieson v. Trevelyan* (1855), 156 Eng. Rep. 642 (Exchequer). And the first English case that *ever* addressed that question in the context of copyright law did not come until 1891—and the only authorities it cited for its conclusion that "full costs" are confined to "costs between party and party" were *Irwine* and *Jamieson*. *See Avery v. Wood & Sons* (1891), 65 L.T. 122 (Eng.). It was thus anything but "well established" in 1831 that the term "full costs" somehow deviated from the ordinary English practice of allowing a prevailing plaintiff to recover "*all* the legall cost of the suit." Coke, *supra*, at 288 (emphasis added).[12]

In all events, whatever changes in costs law were taking place (and whatever modes of statutory construction were *au courant*) across the Atlantic in the 1800s, it is abundantly clear that *Congress* did not think that "full costs" were confined to "costs between party and party" in 1831 (or in 1853 or even in 1909),

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held that the 40-shillings statute overrode statutes allowing a plaintiff to recover its "costs," and it was in the context of extending those decisions to a "full costs" statute that the court made the "no distinction" statement. As such, the court did not address what "full costs" (or "costs") encompassed at the time.

[12] That English courts often held expert fees outside the scope of "party and party" costs once the party-to-party regime took hold, Petr.Br.37-38, is therefore of little moment. That would matter only if petitioners were correct that it was "well-established" in 1831 that "full costs" included only "party and party" costs, and they are not.

as Congress itself repeatedly provided that parties could recover attorneys' fees as early as 1789, and many states followed the same practice in 1831 and beyond. Surely Congress did not think that it was awarding *less* than was available under earlier federal statutes or in the states when it used the term "full costs" in lieu of delineating specific types of costs that could be recovered.

Instead, when Congress used the term "full costs" in 1831, it plainly meant what it said, and plainly was informed by the long-settled practice in Gloucester-era England and then-prevalent practice in the United States. And under that practice, a prevailing party could recover "not merely the fees which the party has had to pay to the officers of the court at the different stages of the litigation, but likewise the fees which he has had to pay to his own lawyers," as well as various "other expenses of preparing his case for trial." McCormick, *supra*, at 235. That is the rule Congress established in 1831, and it is the rule Congress maintained when it retained the Copyright Act's longstanding "full costs" regime in every revision of the Copyright Act since.

IV. Policy Considerations Support Interpreting "Full Costs" To Include All Forms Of Costs.

The parties here can agree about one thing: The Court "need not look to policy considerations at all." Petr.Br.42. When the text of the statute is clear and the plain-language construction avoids superfluity and implied repeals, there is no occasion to look to policy considerations. That said, petitioners' interest in avoiding a policy discussion is understandable, as the availability of "full costs" to prevailing parties

advances copyright policy. Likewise, petitioners' concern about creating differences between copyright and patent law is misplaced, as some degree of differential treatment is inevitable given that the text of the statutes is different in multiple key respects.

1. Copyright infringement actions are expensive, and increasingly so. Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 Colum. L. Rev. 2277, 2286 (2013). That is largely owing to the cost of discovery, which today "form[s] a large part of copyright litigants' expenses." *Id.* at 2289. As this case proves, copyright cases routinely require the need to collect and review massive amounts of materials, and often involve voluminous collections from myriad sources within multiple companies. Yet nearly every dollar spent on discovery falls outside the ambit of the costs taxable under §1920. As a result, unless the term "full costs" is given its ordinary meaning, such that both taxable and nontaxable costs may be awarded, those discovery expenses will be sunk costs even when a plaintiff prevails in proving infringement.

Moreover, without the possibility of recovering *all* of their costs, some injured copyright holders might be deterred from bringing an infringement action at all. That is no mere speculation. Although Congress has attempted to provide ample incentives to vindicate copyrights through a variety of mechanisms (including statutory damages, attorneys' fees, and a generous costs provision, *see* 17 U.S.C. §§504, 505), the costs of vindicating copyrights through infringement remain daunting. And as those costs have risen, the number of copyright claims litigated in court have decreased,

with actions declining by more than half from 2007 to 2011. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: 2011 Annual Report of the Director* 130 (2011).

The surest way to exacerbate that trend would be to ignore the plain text of §505 and force would-be plaintiffs to view e-discovery and other necessary costs of litigation as irretrievably sunk. Honoring the plain text, by contrast, not only gives proper incentives to copyright holders to vindicate existing copyrights, but also helps ensure that less-well-heeled individuals have an incentive to create. The Constitution's Copyright Clause and the American copyright system more generally are "based on the belief that by granting authors the exclusive rights to reproduce their works, they are given an incentive to create." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 477 (1984) (Blackmun, J., dissenting). That incentive obviously would be dulled if would-be creators could not afford to protect their exclusive rights by litigation, especially since the only way to vindicate a copyright (unlike a patent) is through private litigation.

Petitioners note that §505 allows courts to award costs to prevailing defendants as well as prevailing plaintiffs, and claim that this will dissuade "'starving artist[]' rights-holders" from "assert[ing] meritorious claims against 'corporate behemoths.'" Petr.Br.47 (first alteration in original). That argument suffers multiple defects. First, the possibility of deterring frivolous copyright claims by awarding costs to prevailing defendants was obviously a judgment Congress made in 1831 and ever since in providing for

"full costs" to prevailing plaintiffs and defendants alike. Second, as this Court pointed out in rejecting an analogous argument about attorneys' fees, many copyright defendants are also copyright holders. *See Fogerty*, 510 U.S. at 525. Third, petitioners ignore the discretion granted to district courts when it comes to whether to award "full costs." The idea that judges will exercise their discretion to award maximum costs against impecunious plaintiffs with credible but ultimately unsuccessful claims in favor of "corporate behemoths" blinks reality. Finally, petitioners ignore that if a starving artist has a *meritorious* claim, then the potential to recover all the costs that a "corporate behemoth" defendant may inflict will serve only to *encourage* the artist to bring its claim. The contrary rule, by contrast, will almost certainly *discourage* the artist from bringing suit at all.

2. Petitioners claim that their position "is more administrable than" the plain-text regime the Ninth Circuit has followed for the past 15 years. Petr.Br.47. That claim ignores the multiple questions that can arise (and have arisen) over the application of §1920, as well as questions that can arise (and have arisen) over when awarding nontaxable costs is an appropriate sanction for litigation misconduct. All of those questions are essentially mooted under a regime where courts have discretion to award up to the full amount of litigation costs without any need to determine which costs are taxable or which conduct is sanctionable. Not surprisingly, the Ninth Circuit has experienced little difficulty administering the statute as written since *Twentieth Century Fox*, and this case perfectly illustrates how courts can use their

discretion to avoid deciding more difficult questions concerning sanctions.

The questions that can arise under §1920 are manifold. An award of taxable costs "must be carefully tailored" to the items listed in §1920 and may not exceed the limits of §1821. *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 100 (1st Cir. 1990). Yet the terms of those provisions are hardly self-defining. For instance, §1920 authorizes courts and clerks to "tax as costs" "Fees and disbursements for printing and witnesses." 28 U.S.C. §1920(3). But it does not say which witnesses are covered, leaving courts to decide. Wright & Miller §2678 (collecting cases). Even something as seemingly straightforward as whether to allow the expense of transcripts or demonstratives has produced litigation. *See id.* §2677.

Moreover, a "full costs" regime obviates the need to consider whether spoliation or other litigation misconduct of the kind petitioners engaged in here merits the award of nontaxable costs as a discovery sanction pursuant to a court's inherent powers. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1187-88 (2017); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991). Questions about the scope of and authority for such sanctions are a fertile ground for litigation, with the same courts sometimes disagreeing about requisite intent or standard of proof.[13] A discretionary "full costs" regime allows

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[13] *Compare, e.g., Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989) (reversing sanctions due to lack of intent), *with Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) ("recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is enough); *and, e.g., In re*

courts to sidestep those difficult questions and simply make a judgment about which litigation costs should be reimbursed.

This is a case in point. Petitioners engaged in substantial litigation misconduct, including destroying evidence and baldly lying about critical issues, such as the extent of cross-use at Rimini. *See supra*. The district court had ample authority to shift costs as a sanction for that misconduct, but under well-established Ninth Circuit law, there was no need to delve into that inherent-power question. Rather, the court used its discretion to award full, not just taxable, costs to shift substantial amounts of e-discovery and other nontaxable costs that were incurred in large part because of petitioners' misconduct, while providing an across-the-board 25% discount. That approach obviated the need to address questions of inherent power or which costs were caused by what misconduct. All of those questions would be open and need to be decided on remand if this Court were to reverse. *See* BIO.23 n.7.

While the discretionary full-costs regime that has held sway in the Ninth Circuit for decades can avoid difficult questions about the precise scope of §1920 or courts' inherent power, the exercise of sound discretion has not generated any difficulties in application or review. That is hardly surprising. District courts in the Ninth Circuit exercise the same discretion over costs as courts nationwide exercise over attorneys' fees. Here, for example, the court

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Moore, 739 F.3d 724, 730 (5th Cir. 2014) (requiring clear and convincing evidence), *with White v. Reg'l Adjustment Bureau, Inc.*, 647 F. App'x 410, 411 n.1 (5th Cir. 2016) (preponderance).

awarded 80% of the total attorneys' fees sought and 75% of nontaxable costs, while awarding half the costs of one particular expert. Neither discretionary power has been a source of difficulty. Indeed, even the government acknowledges that §505's treatment of attorneys' fees places considerable discretion in the hands of district courts and yet this Court has deemed the regime perfectly "administrable." U.S.Br.29 (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1987 (2016)). That courts might come to divergent conclusions in exercising discretion does not mean that the system is difficult to administer. It is simply the unremarkable product of a grant of discretion.

3. Finally, petitioners insist that interpreting the Copyright Act consistent with its plain terms "would introduce an inexplicable rift in federal intellectual property cost recovery" because the Lanham Act and the Patent Act do not authorize recovery of "full costs." Petr.Br.45; *see also* U.S.Br.30. But no matter how this Court resolves the question presented, there will be a "rift" between the treatment of costs under the copyright and patent/trademark laws. While the Copyright Act grants a court discretion to award full costs, 17 U.S.C. §505 ("in its discretion"), the trademark and patent statutes make an award of costs mandatory, 15 U.S.C. §1117(a) ("shall be entitled"); 35 U.S.C. §284 ("shall award"). And while the trademark and patent laws allow an award of attorneys' fees as part of costs only in "exceptional" cases, 15 U.S.C. §1117(a); 35 U.S.C. §285, attorneys' fees are available in all copyright cases, exceptional or not.

There is nothing "inexplicable" about these differences. They are explicable in the most obvious way imaginable: The different treatment follows ineluctably from different statutory text. And even beyond rules for costs recovery, there are other distinct copyright rules with no analog in trademark or patent law designed to facilitate the vindication of copyrights. As mentioned, since the very first Copyright Act, Congress has allowed copyright owners to recover statutory damages for infringement. *See, e.g.*, Act of May 31, 1790, ch. 15, §§2, 6, 1 Stat. 124, 125 (authorizing recovery of "fifty cents for every sheet which shall be found in [the infringer's] possession"). Consistent with Congress' recognition that proving actual damages from copyright infringement can be difficult, statutory damages remain available even where "no actual damage had been shown." *Douglas v. Cunningham*, 294 U.S. 207, 208 (1935). Patent law, by contrast, makes no provision for statutory damages, and trademark law permits statutory damages only for counterfeit marks and cybersquatting, not for ordinary infringement. *See* 15 U.S.C. §1117(c)-(d).

The availability of statutory damages, attorneys' fees in non-exceptional cases, and "full costs" is not the product of some inexplicable indulgence to copyright owners. Those remedies are a recognition of core distinctions between copyrights and other intellectual property rights. Whereas patents are generally understood as "industrial property" rights, copyrights generally protect individuals and "reflect the personal values of authors and artists," as well as "society's interest in encouraging such creative activity." Richard H. Stern, *The Bundle of Rights Suited to New*

Technology, 47 U. Pitt. L. Rev. 1229, 1231 n.1 (1986). Consistent with that understanding, copyrighted works can merit full protection even when they are not commercially valuable. *See* Robert Spoo, *Three Myths for Aging Copyrights:* Tithonus, Dorian Gray, Ulysses, 31 Cardozo Arts & Ent. L.J. 77, 82 (2012) ("under our present laws, all ... works," even those "of no economic value," "are protected ... when they are 'fixed' in a tangible medium of expression"); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890).

As this Court thus has explained, "a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers," and indeed, little incentive to bring infringement actions in the first place. *F.W. Woolworth*, 344 U.S. at 233. Moreover, many copyright actions seek only injunctive relief, not monetary damages. Particularly in that context (or a context where only minimal statutory damages are available), bringing an infringement action that requires considerable e-discovery costs and attorneys' fees makes sense if and only if the copyright owner has the potential to recover those costs.

In short, sound copyright policy demands adequate incentives for creators to bring meritorious infringement actions. That is especially true when it comes to things like e-discovery costs, which are by no means voluntary. If those costs cannot be recovered even when the trial judge finds their recovery appropriate, then some meritorious suits will not be brought. The copyright laws have protected against that possibility for nearly two centuries through the

promise of "full costs." Abandoning that straightforward promise and restricting prevailing parties to a subset of costs in contravention of Congress' clear command would disregard clear text and undermine sound copyright policy.

CONCLUSION

For the foregoing reasons, the Court should affirm.

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